

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
J. WILLIAM HOLT : DETERMINATION
DTA NO. 820283
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1994 through 1997. :

Petitioner, J. William Holt, Amen Farm, 523 Naskeag Point Road, Brooklin, Maine 04616, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1994 through 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the office of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 1, 2005 at 10:30 A.M., with all briefs and evidence to be submitted by May 5, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner has shown that he was not present in New York City for more than 183 days during 1994, 1995, 1996 or 1997 and therefore not taxable as a resident individual for those years pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

II. Whether, if petitioner was not such a resident individual, petitioner has shown that he properly allocated his income during the years at issue.

III. Whether petitioner has shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

1. On, August 26, 2002 and August 29, 2002, following an audit, the Division of Taxation (“Division”) issued to petitioner, J. William Holt, notices of deficiency which asserted additional New York State and New York City personal income tax due for the years 1994 through 1997 as follows:

Year	1994	1995	1996	1997
NYS Tax Due	\$ 74,839.82	\$ 65,052.29	\$590,698.48	\$124,003.73
NYC Tax Due	\$132,087.07	\$155,270.06	\$369,431.72	\$ 80,436.20
Total	\$206,926.89	\$220,322.35	\$960,130.20	\$204,439.93

2. The notices of deficiency also asserted interest and penalties for negligence and substantial understatement of tax pursuant to Tax Law § 685(b) and (p) for each of the years at issue.

3. Pursuant to a Conciliation Order dated September 3, 2004 and issued by the Division’s Bureau of Conciliation and Mediation Services, the 1996 New York State income tax deficiency was reduced to \$5,911.00 in additional tax due. This adjustment resulted from the application of a resident tax credit of \$584,787.00 to the asserted New York State liability for 1996.¹

¹ Following the conciliation conference, petitioner produced a 1996 State of New Jersey Income Tax Resident Return which reported \$584,787.00 in New Jersey tax liability for that year. There are no other New Jersey returns in the record.

4. The Conciliation Order made no other adjustments to the asserted deficiencies of State and City income tax for the years at issue and made no adjustments with respect to penalties asserted pursuant to the statutory notices.

5. The subject deficiencies resulted from the Division's conclusion that petitioner was properly subject to tax as a resident of New York State and City for the years 1994 through 1997. Accordingly, the Division determined that all of petitioner's income for the years at issue was New York State and City adjusted gross income.

6. At all times relevant herein, petitioner was a New Jersey domiciliary. Petitioner and his wife, Irina L. Holt, maintained their primary residence in the Princeton, New Jersey area since the late 1950's, continuing through the years at issue. Petitioner and his wife raised their children in the Princeton area, and had many friends and were socially active in the Princeton area. In addition, Mrs. Holt had been a graduate student at Princeton University and taught piano in Princeton and Scotch Plains, New Jersey for many years.

7. Petitioner has had a long career in the insurance industry. From the 1950's through the 1970's he worked in New York City for various insurance and reinsurance companies. In the 1980's he developed and was involved in several New Jersey insurance enterprises, including Reinsurance Management Service, also called "RMS," which underwrote accident and health reinsurance and had a subsidiary specializing in advising travel agents and others in the sale of accident and health insurance products, and Management Facilities Corporation of Lawrenceville, New Jersey, also called "MFC," which underwrote health reinsurance programs and had a subsidiary specializing in hospital management. RMS and MFC were successful businesses, each having about 200 employees.

8. Petitioner remained involved with RMS and MFC during the years at issue. He regularly met with executives and attended board meetings at their New Jersey offices.

9. Petitioner was also involved with Gramercy, an insurance business with its main office in Texas which had one executive based in New York City, and Butler Holt Corporation, a New Jersey-based insurance company.

10. Petitioner also had business interests outside of New Jersey during the years at issue, including an investment in a Russian insurance company; consulting work with General Electric concerning how to enter the Russian insurance market; creation of a stock brokerage firm in Rio de Janeiro; involvement in a Portland, Maine disability reinsurance business; and involvement in an Annapolis, Maryland marine insurance business.

11. In November 1996, petitioner opened the Firebird Restaurant, a Russian restaurant, at 365 West 46th Street, New York, New York. Petitioner was the sole owner of the restaurant.

12. Petitioner's wife became seriously ill during the years at issue and was hospitalized in the Princeton area. She died on March 6, 1997.

13. In 1977, petitioner purchased a brownstone located at 206 East 61st Street, New York, New York. This property, which petitioner owned throughout the years at issue, consisted of four apartments occupying four floors. Petitioner rented three of the apartments to tenants and used one apartment as an office and living space. Petitioner's office-apartment had a room used by his New York secretary, a kitchen and bathroom, and a room described by petitioner as "not really a bedroom, it was kind of an office, sitting room," which had a pull-out couch to sleep on. Petitioner referred to the brownstone in his testimony as a "house." Petitioner used his office-apartment as a base from which he could pursue his various business, charitable, cultural and social interests. It was often used as a place to meet business associates.

14. Petitioner operated Holt Enterprises, a subchapter S corporation, from his East 61st Street office. According to petitioner, Holt Enterprises had formerly been a holding company for his interests in other companies, but that during the period at issue it did no business. The 1996

Federal schedule C for Holt Enterprises reported no income and \$72,968.00 in expenses.² The 1997 schedule C for Holt Enterprises reported \$90,549.00 in gross income and \$39,673.00 in gross profit. The schedule C's reported the business of Holt Enterprises as reinsurance management services.

15. Although petitioner occasionally slept at his office-apartment, he generally returned to the Princeton area in the evening following a day spent in New York.

16. As noted, petitioner had a secretary in New York, Mary Avdellis, who worked at the 206 East 61st Street office on a daily basis. Petitioner also had an employee who was his financial advisor with whom he met regularly in New York.

17. Petitioner's Princeton area home is about an hour by train from New York City. Petitioner generally traveled between his home and the City by train during the years at issue. He was often in both New York and New Jersey on the same day.

18. During the years at issue, petitioner usually traveled to New York to pursue his various business, charitable, cultural or social interests on weekdays. He generally did not spend time in New York on weekends.

19. Petitioner spent a considerable amount of time during the years at issue away from the New York and Princeton areas. Petitioner had a home in Maine and, on average, spent about 31 days per year in Maine during the years at issue. Petitioner also traveled abroad on business, mostly to England and Russia, about 23 days per year during the relevant period.

20. Petitioner filed New York nonresident returns (Form IT-203) during the years at issue. On each such return, petitioner reported that neither he nor his spouse maintained living quarters in New York State.

² Although neither petitioner's 1996 Federal nor New York returns is in the record (*see*, Footnote "3", *infra*), petitioner's 1996 schedule C's were attached to his 1996 New Jersey resident income tax return which is in the record.

21. The Division's audit of petitioner began with an examination of the 1994 and 1995 tax years. The record does not indicate when the audit began,³ but in response to the Division's request petitioner provided copies of his business diaries and business appointment books ("business diaries") and his Citibank and American Express credit card statements for those years. Petitioner also completed a residency questionnaire dated July 29, 1997 pursuant to the Division's request and reported on the questionnaire that he was present in New York on 144 days in 1994 and 153 days in 1995. Petitioner also submitted schedules listing his claimed whereabouts on each day in 1994 and 1995.

22. The Division reviewed the documentation submitted by petitioner and determined that he was physically present in New York on 206 days in 1994 and 210 days in 1995. In reaching this conclusion the Division accepted petitioner's conceded New York days as indicated by the schedules submitted on audit. With respect to petitioner's claimed non-New York days, following a review of the documentation submitted, the Division accepted 159 days outside New York in 1994 and 155 non-New York days in 1995. The Division rejected petitioner's claim that he was not physically present in New York with respect to 62 days in 1994 and 57 days in 1995 ("disputed days"). The Division thus determined the disputed days to be days spent in New York.

23. The disputed days consist of business days (weekdays) where the Division determined that documentation submitted indicated a New York presence and also undocumented business days. The Division thus generally determined business days to be New York days. The

³ The Division's original file of its audit of petitioner was destroyed in the World Trade Center attacks of September 11, 2001. The file was later reconstructed, but certain documents remain lost. Specifically, the reconstructed audit file does not contain audit appointment letters for the 1994-1995 audit, any audit logs reflecting pre-9/11 audit activity, certain consents extending the period of limitations for assessment, petitioner's 1994, 1995 and 1996 New York income tax returns, and any credit card statements submitted by petitioner for the years 1994 and 1995.

disputed days also consist of weekend days where the documentation submitted indicated a New York presence. The Division generally deemed weekend days to be non-New York days unless the documentation submitted indicated a New York presence. Hence, there are no undocumented weekend days included in the disputed days. On audit, the Division found that documentation indicated a New York presence where the business diaries or calendars indicated New York activity or where credit card statements indicated a New York purchase.

Undocumented days were those where the business diaries indicated no New York activity and on which there were no credit card purchases.

24. Although the credit card statements submitted with respect to 1994 and 1995 are not in the record (*see*, Footnote “3”), the auditor’s schedules of days in and out of New York for 1994 and 1995, which was prepared during the course of the audit, makes reference to 18 credit card charges in 1994 and 9 credit card charges in 1995. The schedule indicates that the auditor used the location of the credit card purchase as a basis to determine petitioner’s location on that day.

25. A review of the auditor’s schedule of days in and out of New York for 1994 reveals 12 disputed days on which there were New York credit card purchases. Of these, seven occurred on weekdays and five on weekends. The schedule of days in and out for 1995 shows that all nine of the documented credit card charges occurred on disputed days, all of which were weekdays.

26. By letters dated June 8, 2000 and December 12, 2000, the Division advised petitioner that the audit was being expanded to include the tax years 1996 and 1997 and requested documentation, including diaries, to establish petitioner’s day-to-day whereabouts during those years. Petitioner did not provide any such requested documentation prior to the issuance of the Notice of Deficiency on August 29, 2002.

27. On July 12, 2002, petitioner and his former representatives met with the Division's auditors to discuss the audit of the 1994 and 1995 tax years. During that meeting petitioner advised the auditors that he had personal diaries and that he would think about producing them for the Division's review. At the hearing petitioner stated that he did not turn the personal diaries over to the Division because the auditor had not properly treated the business diaries he had previously produced. Petitioner did not produce any personal diaries for the Division's review until after the hearing held in this matter.

28. On September 18, 2003, at the conciliation conference held in respect of the subject statutory notices, petitioner, through his representatives, agreed to submit documentation for 1996 and 1997. In January 2004, petitioner's former representatives provided the Division with copies of petitioner's business appointment book, secretary's appointment book, and business calendar for 1996 and 1997 ("business diaries"). Petitioner's representatives also provided American Express credit card statements showing purchases in December 1995, March, April, May, July, August and November 1996, and Bloomingdale's credit card statements showing purchases in November and December 1995. Such statements document 9 purchases in 1995 and 20 purchases in 1996. Petitioner also submitted a schedule of claimed days in and out of New York for those years which indicated 56 New York days in 1996 and 86 New York days in 1997.

29. Petitioner's January 2004 submission of documentation did not include and did not make reference to any personal diaries. In a letter dated January 26, 2004 accompanying the submission, petitioner's former representative referred to the business diaries and appointment books, but made no reference to any personal diaries.

30. The Division reviewed the 1996 and 1997 documentation submitted by petitioner and determined that he was physically present in New York on 236 days in 1996 and 210 days in

1997. In reaching this conclusion the Division accepted petitioner's conceded New York days as indicated by the schedules submitted on audit. With respect to petitioner's claimed non-New York days, following a review of the documentation submitted, the Division accepted 130 days outside New York in 1996 and 155 days outside New York in 1997. The Division thus rejected petitioner's claim that he was not physically present in New York with respect to 180 days in 1996 and 124 days in 1997 ("disputed days").

31. Similar to the 1994-1995 audit, the disputed days consist of business days (weekdays) where the Division determined that documentation submitted indicated a New York presence and also undocumented business days. The Division thus generally determined business days to be New York days. The disputed days also consist of weekend days where the documentation submitted indicated a New York presence. The Division generally deemed weekend days to be non-New York days unless the documentation submitted indicated a New York presence. Hence, there are no undocumented weekend days included in the disputed days. Also similar to the 1994-1995 audit, the Division found that documentation indicated a New York presence where the business diaries or calendars indicated New York activity or where credit card statements indicated a New York purchase. Undocumented days were those where the business diaries indicated no New York activity and on which there were no credit card purchases.

32. The credit card statements submitted with respect to 1996 are in the record. The auditor's schedules of days in and out of New York for 1996, which was prepared following receipt of the 1996 documentation, makes reference to the 1996 American Express credit card charges. A review of the statements indicates that the auditor used the location of the credit card purchase as a basis to determine petitioner's location on that day.

33. The record shows that the Division used credit card purchases at Bloomingdale's in New York on December 14 and 21, 1995 as evidence of petitioner's whereabouts on December

14 and 21, 1996. Accordingly, there is no documentation in the record indicating a New York presence for petitioner on Saturday December 14 and Saturday December 21, 1996.

34. At the hearing petitioner submitted a summary of the business diaries previously provided to the Division and of certain personal diaries (“New Jersey diaries”) which had not been submitted previously. For each day of the four-year period at issue, this summary provides an interpretation of the information on the various business diaries and calendars and a recapitulation of the entries on the New Jersey diaries. Based on such information, the summary also provides petitioner’s determination of his whereabouts on each such day. In total, the summary asserts that petitioner was in New York on 74 days in 1994, 48 days in 1995, 68 days in 1996, and 92 days in 1997.

35. Petitioner did not offer the New Jersey diaries at the hearing, but was granted leave to submit such documents post-hearing. The submitted diaries are photocopied pages of a bound book or books with brief handwritten dated entries. It is unclear whether the originals of the diaries are bound in a single volume or multiple volumes. Handwritten on the first page of the 1994 diary is “Tina Seabriakov, Scotch Plains, N.J.” The content of the diary entries is varied and includes references to lunch or dinner engagements or other social or cultural activities; travel arrangements with airports and flight times; the names of guests or visitors; a location (e.g., “New York” or “Spring Lake”); household chores (e.g., “landscaping,” “finished harrowing & seeding”); or personal matters (“at home recovering,” “in bed with flu,” “kids stay over”). The 1994 diary entries appear to have been made by more than one hand and more than one pen. It appears that the 1995, 1996 and 1997 entries were made by the same pen and the same hand.

36. The business diaries submitted by petitioner for the years at issue contain typewritten and handwritten entries noting various meetings, appointments and reminders. The business

diaries note the location of meetings or appointments only occasionally. The diaries specifically note petitioner's business travel and his travel to Maine, usually noting flight arrival and departure times. There are several days for which the business diaries do not list any appointments, but which indicate petitioner's presence in New York (e.g., 3/14/94: "Mr. Holt coming late "; 5/1/94: "Mr. H leaving early"; 6/26/95: "Mr. Holt late?"; 3/4/96: "Mr. Holt coming in late this afternoon"). There are also days which indicate petitioner's presence elsewhere (e.g., 1/24/94: "Princeton"; 5/6/96 and 5/7/96: "Mr. Holt in Princeton"; 6/27/94: "Mr. Holt late? - Not coming in"). The business diaries did not list any meetings, appointments or reminders (i.e., were blank) for about 75 business days during the four years at issue. The business diaries were kept by petitioner's secretary, Mary Avdellis.

37. Petitioner incurred a net operating loss in 1999. He timely filed an amended 1997 return for a carryback of the 1999 net operating loss to 1997. A copy of petitioner's Federal Form 1040X for 1997 reports a net change in his Federal adjusted gross income for 1997 of \$1,064,137.00.

CONCLUSIONS OF LAW

A. Tax Law § 601 and New York City Administrative Code § 11-1701 impose, respectively, New York State and New York City personal income tax on State and City "resident individuals." An individual may fall within the definition of a resident as a domiciliary or as a "statutory resident," defined in Tax Law § 605(b)(1)(B) as someone:

who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

New York City Administrative Code § 11-1705(b)(1)(B) contains an identical definition of statutory residency to that given above, except for the substitution of the term “city” for “state.”

B. In the instant matter the Division concedes that petitioner was, at all times relevant, domiciled in the State of New Jersey. Petitioner was therefore not a resident individual pursuant to Tax Law § 605(b)(1)(A) or New York City Administrative Code § 11-1705(b)(1)(A). The Division asserts, however, that petitioner was a statutory resident of New York State and City pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

C. On the question of statutory residency, the law is clear that it is petitioner’s burden to prove by clear and convincing evidence that he was not present in New York State or City for more than 183 days during 1994, 1995, 1996 or 1997 (*see, Kornblum v. Tax Appeals Tribunal*, 194 AD2d 882, 599 NYS2d 158; *Smith v. State Tax Commn.*, 68 AD2d 993, 414 NYS2d 803).⁴ Specifically, pursuant to the Division’s regulations,⁵ an individual, like petitioner, who claims a domicile outside New York but who maintains a permanent place of abode within New York, “must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within New York” (20 NYCRR 105.20[c]). Moreover, for purposes of counting the number of days spent within and without New York,

⁴ Petitioner does not dispute and the record clearly establishes that the apartment-office at 206 East 61st Street was a “permanent place of abode” pursuant to Tax Law § 605(b)(1)(B) and Administrative Code § 11-1705(b)(1)(B) (*see*, 20 NYCRR 105.20[e][1]).

⁵ The Division’s regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code and any reference in such regulations to “New York State domicile, resident and nonresident shall apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable” (*see*, 20 NYCRR 290.2).

presence within New York for any part of a calendar day constitutes a day within New York (*see*, 20 NYCRR 105.20[c]; *Matter of Leach v. Chu*, 150 AD2d 842, 540 NYS2d 596).

D. My review of the testimony and all other evidence presented in this matter compels the conclusion that petitioner has failed to meet his burden to show that he was not present in New York State or New York City for more than 183 days during 1994, 1995, 1996, or 1997. Accordingly, the Division's determination that petitioner was subject to New York State and New York City income tax as a resident individual was proper.

Much of petitioner's case rests on the probative value to be accorded the so-called New Jersey diaries, copies of which were submitted post-hearing. Petitioner has failed, however, to establish the authenticity of these documents. Absent such authentication, the New Jersey diaries are properly given little evidentiary weight herein.

Questions as to the authenticity of the New Jersey diaries arise from petitioner's failure to produce such diaries for review until after the hearing. If petitioner had diaries which indicated his whereabouts on each day during the audit period, it would seem logical to produce such documents for examination during the audit and prior to the issuance of any notices of deficiency. Petitioner's stated reason for his failure to produce the diaries during the audit, that the Division failed to treat the business diaries properly (*see*, Finding of Fact "27"), runs contrary to his interest in resolving the audit in his favor. Instead, petitioner was apparently content to permit the audit to proceed using the business diaries, which were blank for many of the days under review, and credit card purchases, which were few in number, rather than using the New Jersey diaries which purport to show petitioner's whereabouts on virtually each day during the audit period. Furthermore, although petitioner referred to the New Jersey diaries at a meeting with the auditors on July 12, 2002, his former representatives were apparently unaware of such diaries, as they did not use such diaries in their calculation of days in and out of New

York during the course of the audit. Moreover, in a letter to the auditors dated January 26, 2004, petitioner's former representative discussed the documentation to be submitted with respect to 1996 and 1997, but made no reference to any New Jersey diaries.

Additionally, the entries in the New Jersey diaries for the years 1995, 1996 and 1997 appear to have been made with the same pen. This, too, weighs against a finding of authenticity, as it seems unlikely that an individual would use the same pen over a three-year period. Petitioner's submission of photocopies of the New Jersey diaries also weighs against a finding of authenticity. While copies of documents are permissible under the Rules of Practice and Procedure (*see*, 20 NYCRR 3000.15[d][2]), the submission of copies deprives the administrative law judge of the opportunity to closely examine the original documents to determine authenticity.

Apart from the questions of authenticity, the New Jersey diaries are properly given little weight because of a lack of foundational evidence. Specifically, it is unclear from the record who made the individual entries. In his brief, petitioner asserts that these diaries were kept by his New Jersey assistant, Tina Seabriakov, and augmented by his own notes. Ms. Seabriakov, however, did not testify at the hearing and there is no evidence or testimony regarding which specific entries were petitioner's and which were his assistant's. If made by the assistant, the record lacks evidence establishing that such individual was in a position to know petitioner's whereabouts on any particular day. There is also no evidence in the record as to when the entries were purportedly made (e.g., daily, weekly, etc.), another factor in their accuracy and hence probative value.

Having discounted the New Jersey diaries, it follows that petitioner's summary of days in and out of New York, which is largely based upon the diaries, is also properly given little weight herein.

The remaining evidence in the record, the business diaries, appointment books and calendars and credit card statements and petitioner's testimony, is insufficient to establish any significant error in the Division's audit and is thus insufficient to meet petitioner's burden to show that he was not a statutory resident of New York State or City during the years at issue.

The most glaring deficiency regarding the remaining evidence in the record is the lack of testimony with respect to petitioner's day-to-day whereabouts during the years at issue. Such testimony is especially important given the close proximity of petitioner's Princeton area home to New York City, petitioner's frequent travel between New York and New Jersey, and the fact that petitioner was frequently in both New York and New Jersey on the same day. Such circumstances require a high degree of specificity of proof in order for a taxpayer to meet his or her burden on the question of statutory residency (*see, Matter of Avildsen*, Tax Appeals Tribunal, May 19, 1994). Here, petitioner did not testify as to his whereabouts on any specific day or days during the years at issue. Although the passage of time from the years at issue to the hearing might impede petitioner's recollection of such details, surely the business diaries could have aided in refreshing his recollection of his whereabouts on specific days. Additionally, other than with respect to weekends, petitioner did not testify as to any general pattern of being present or absent from New York on specific days of the week or times of the year (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990). It is further noted that petitioner did not offer the testimony of any third party, such as his New Jersey assistant, his New York secretary or any other employees or business associates, to corroborate his claim that he was present in New York on a limited basis during the years at issue or to testify as to his whereabouts on any specific day or days.

In light of the foregoing, I have reviewed the evidence in the record with respect to each of the disputed days during the four-year audit period. With a minor exception (*see, Finding of*

Fact “33”), I find that such evidence fails to show that petitioner was not in New York on any of the disputed days. As noted previously, the disputed days consist of weekdays both documented by New York activity as indicated by the diaries or by a New York credit card purchase and undocumented by any diary activity or credit card purchases. With respect to the documented weekdays, my review of the diaries indicates that the Division properly concluded that the noted activity indicated a New York presence by petitioner. The record lacks any evidence to show that any specific activity as noted in the diaries on any disputed day did not involve petitioner or occurred outside New York.

As to the disputed days for which the business diaries indicated no New York activity and on which there were no credit card purchases, petitioner asserted that the absence of an entry in the business diaries indicates his absence from New York on those days. Petitioner, however, failed to submit any testimony or an affidavit from his New York secretary, the person who maintained the diary, as to whether, in fact, the lack of any appointments on a given day is indicative of petitioner’s absence from New York on that day. Furthermore, it is noted that there are days for which the business diaries do not list any appointments, but which indicate petitioner’s presence in New York and there are other entries which specifically note petitioner’s absence from New York (*see*, Finding of Fact “36”). Such entries cast doubt upon petitioner’s claim that the absence of appointments on a given day means an absence from New York. Under such circumstances, and given the lack of testimony from the person who maintained the business diaries, petitioner’s contention must be rejected.

It is noted that the disputed days also consist of weekend days documented by a credit card purchase. Petitioner offered no evidence to refute such documentation.

Petitioner contended that the Division did not use the submitted credit card statements in its audit of 1996 and 1997. This contention is in error. A review of the audit workpapers and the

statements which are in the record shows that the Division used the statements in its audit. It is further noted that the Division's determination that a credit card purchase from a New York seller indicates a New York presence on that day was reasonable.

Regarding the credit card statements for 1994 and 1995, while the loss of such statements was unfortunate,⁶ such loss did not affect the audit or petitioner's ability to refute the audit results in any significant way. The workpapers indicate that there were only 12 disputed days in 1994 with credit card purchases and only 9 disputed days with credit card purchases in 1995. Seven of these 12 days in 1994 and all 9 of these days in 1995 were weekdays and thus would have been classified as New York days on audit even if one did not consider the credit card purchases.

In his brief petitioner asserted that certain appointments noted in the business diaries took place in New Jersey. Petitioner, however, offered no testimony on this point at the hearing. Moreover, even if it were shown that certain appointments took place in New Jersey, given its close proximity to New York, such appointments obviously would not preclude petitioner from spending part of any such day in New York. It is noted that the testimony of petitioner's New York secretary or other business associates could have established the location of certain appointments and whether or not petitioner was generally in New York on days he had meetings in New Jersey.

E. In light of the finding that petitioner was properly subject to tax as a resident individual, Issue II is moot.

F. The subject Notice of Deficiency asserts penalties pursuant to Tax Law § 685(b) and (p). Tax Law § 685(b) provides for the imposition of penalties if any part of a deficiency is due

⁶ Considering the circumstances under which they were lost (*see*, Footnote "3"), petitioner's characterization of the Division as negligent in the loss of these documents is baseless.

to negligence or intentional disregard of Article 22 or the regulations promulgated thereunder. Tax Law § 685(p) provides for the imposition of a penalty where there is a “substantial understatement” of the amount of income tax required to be shown on a return. Such penalty may be waived upon a showing of reasonable cause for the understatement and a that the taxpayer acted in good faith.

Although the petition filed in this matter raises the issue of penalty, petitioner offered no argument either at hearing or on brief for the abatement of penalties imposed herein. Furthermore, petitioner’s nonresident tax returns for each of the years at issue, which report that he did not maintain living quarters in New York, support the imposition of penalties (*see*, Finding of Fact “20”). Accordingly, the penalties imposed herein are sustained.

G. The petition of J. William Holt is denied and the notices of deficiency dated August 26, 2002 and August 29, 2002, as modified pursuant to the Conciliation Order dated September 3, 2004, are sustained.

DATED: Troy, New York
November 2, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE